Team # 21

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES,

Defendant-Appellee-Cross-Appellant,

v.

STATE OF PROGRESS

Intervenor-Appellee-Cross-Appellant,

On Appeal from the United States District Court for the District of New Union
Civ. No. 148-2011, Dated June 2, 2011

BRIEF OF THE INTERVENOR-APPELLEE-CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702. The district court dismissed the complaint based on its ruling that New Union lacked subject matter jurisdiction. This appeal seeks review of that lower court decision.

II. Jurisdiction on Appeal

On June 2, 2011, the district court granted the United States' motion for summary judgment based on the four arguments made by the United States Army Corps of Engineers. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are presented on appeal:

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its parens patriae capacity as protector of its citizens who have an interest in groundwater in the state.

II. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Section 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1344(a) and 1362(7).

III. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by OMB that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STATEMENT OF THE CASE

I. Procedural Background

The State of New Union (New Union) filed suit in the United States District Court for the District of New Union, seeking review of a permit issued by the Secretary of the Army, acting through the United States Army Corps of Engineers (COE). Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, grants authority to the COE to issue a permit for the discharge of fill material into waters of the United States. Here, the COE issued a permit to the United States Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp. New Union argued that the court should require the Administrator of the Environmental Protection Agency (EPA) to issue a permit in this case under her authority granted by Section 402 of the CWA, 33 U.S.C. § 1342. The State of Progress (Progress) intervened pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The District Court decided in favor of the United States. The court ruled that: (1) New Union lacks standing; (2) Lake Temp is a navigable water body; (3) the COE has jurisdiction to issue a § 404 permit because the slurry is fill material; and (4) the Office of Management and Budget (OMB) did not violate the CWA in resolving the dispute between the EPA and the COE. New Union and Progress filed appeals with the United States Court of Appeal for the Twelfth Circuit.

II. Factual Background

Lake Temp is an oval-shaped, intermittent body of water that is wholly located within Progress. The lake is up to three miles wide and nine miles long during the rainy season in wet years. Lake Temp is completely dry during dry years. Inflow to the lake comes from an eight hundred square mile watershed of surrounding mountains, and there is no outflow from Lake

Temp. The Imhoff Aquifer is situated below Lake Temp, separated from the lake by alluvial fill. Five percent of the aquifer is located in New Union.

In 1952, Lake Temp became part of a military reservation owned by the DOD. Although the lake was never fully fenced, the DOD posted signs every 100 yards, strictly forbidding access to the lake from both sides of the highway that runs along the property line. Trespassers who have used the lake for hunting and bird watching have done so illegally, in blatant violation of the DOD's posted signs.

Recently, the DOD proposed construction of a new facility on the shore of Lake Temp. The DOD would use the facility to receive and prepare a wide variety of spent munitions and to create a slurry mixture which would be pumped evenly into Lake Temp. This process will raise the entire lakebed by several feet, raise the top water level by six feet, and expand the surface area of the lake by two square miles. The DOD believes that alluvial deposits will eventually cover the slurry, returning it to "its pre-operation condition." The DOD applied to the COE for a § 404 permit to discharge the spent munitions slurry

The COE issued a permit to the DOD without public objection from the EPA. The OMB participated in the discussions between the COE and the EPA regarding the issuance of the permit.

STANDARD OF REVIEW

The Twelfth Circuit evaluates a district court's grant of summary judgment *de novo*. *NRDC v. EPA*, 542 F.3d 1235, 1241. According to the Administrative Procedure Act (APA), federal agency action is also reviewed *de novo*. 5 U.S.C. § 554 (2006).

SUMMARY OF THE ARGUMENT

New Union has standing to bring its claim against the federal government in both its sovereign capacity as owner and regulator of the groundwater, and its parens patriae capacity as protector of its citizens who have an interest in the groundwater. New Union has standing in its sovereign capacity because the three required elements are met. First, the state has suffered an injury in fact. Second, the injury is fairly traceable to the challenged action. Third, the requested relief will effectively remedy the injury.

Additionally, New Union has standing in its parens patriae capacity because the two required elements are met. First, the health, safety, and economic wellbeing of a significantly substantial segment of New Union's population is affected. Second, New Union has quasi-sovereign interests in preserving its rightful status within the federal system and in protecting the health and wellbeing of its citizens.

Further, Lake Temp is not navigable. "Navigable waters" under the Clean Water Act are defined as "the waters of the United States, including the territorial seas." 33 U.S.C.A. § 1362(7). Lake Temp is not a navigable water body under the COE's expansive definition of navigability for three reasons: (1) Lake Temp does not meet the required threshold element of being relatively permanent, standing, or continuously flowing; (2) Even if the threshold element is met, the threshold element is not controlling law; and (3) Even if the threshold element is met, Lake Temp does not fit into any of the COE's three categories of "waters of the United States." Even if Lake Temp is a navigable water body under the COE's expansive definition of navigability, the COE's definition is unconstitutional. For these reasons, Lake Temp is not subject to the CWA's provisions, and neither the COE nor the EPA has jurisdiction to issue a permit pursuant to the CWA. Thus, the COE did not have jurisdiction to issue a § 404 permit in this case.

Alternatively, if Lake Temp is subject to the CWA's provisions, only the COE, and not the EPA, had jurisdiction to issue a permit in this case because the slurry to be discharged into Lake Temp is fill material. The discharge is fill material because it will increase the elevation of the lake.

Finally, the OMB's participation in deciding the dispute between the COE and the EPA did not violate the CWA, and the EPA did not violate the CWA by acquiescing to the OMB's directive.

ARGUMENT

The district court erred in granting the United States' motions for summary judgment on the following issues: (1) that New Union did not have standing, and (2) that Lake Temp was navigable. The district court correctly granted the United States' motions for summary judgment on the following issues: (3) that the COE had jurisdiction to issue a § 404 permit, and (4) that the OMB's resolution of the dispute between the COE and the EPA did not violate the CWA.

I. THE DISTRICT COURT ERRED IN GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT AND IN RULING THAT NEW UNION DOES NOT HAVE STANDING TO BRING THIS CLAIM.

New Union has standing to bring this claim in two capacities: (A) its sovereign capacity as owner and regulator of the groundwater, and (B) its parens patriae capacity as protector of its citizens who have an interest in the groundwater in the state.

A. New Union has Standing to Bring this Action in its Sovereign Capacity as Owner and Regulator of the Groundwater.

To establish standing in its sovereign capacity, New Union must show that it has standing pursuant to Article III of the United States Constitution. *Mass. v. EPA*, 549 U.S. 497, 505 (2007). Generally, to prove Article III standing, a state must prove three elements: (1) That it suffered an injury in fact, (2) That there is a causal connection between the injury and the conduct

complained of, and (3) That there is some possibility that the requested relief will prompt the injury-causing party to reconsider its conduct. *Id*.; *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). However, in *Mass. v. EPA*, the United States Supreme Court held that when Congress has granted a litigant a procedural right to protect his interests, that litigant has a constitutional right, pursuant to Article III to assert "special solicitude" standing. *Mass.*, 549 U.S. at 517-18, 520. A special solitude litigant may assert standing "without meeting all the normal standards for redressability and immediacy" *Id*. at 517-18 (internal citations omitted). The litigant therefore need not prove that his injury is imminent or immediate, and the litigant "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id*.

New Union is a special solitude litigant because Congress has granted New Union a procedural right to protect its interests. The United States Supreme Court recognizes that the States surrendered "certain sovereign prerogatives" when they entered the Union and that States have standing to protect their quasi-sovereign interests by challenging federal agency action. *Id*. at 519-20. New Union thus has a constitutional right to establish standing to protect its interests. *See id*.

To establish standing in its sovereign capacity, New Union must prove three elements: (1) That New Union suffered an injury in fact, (2) That there is a causal connection between the injury and the conduct complained of, and (3) That there is some possibility that the requested relief will prompt the injury-causing party to reconsider its decision. *Id*.; *see also Lujan*, 504 U.S. at 560-61.

i. New Union has Suffered an Injury in Fact Because the Threat of Contamination of the Imhoff Aquifer is a Particularized, and not Merely Speculative, Harm.

To establish an injury in fact, New Union need not prove that its injury is immediate or imminent, but merely that it is "particularized." *Mass.*, 549 at 517-18. A showing of threatened harm or increased risk of harm is sufficient to show an injury in fact. *Lujan*, 504 U.S. at 571-72. *Consolidated Companies*, a Fifth Circuit decision, involved contaminants in a water body. *Consol. Cos., Inc. v. Union Pac. R.R. Co.*, 499 F.3d 382, 385-86 (5th Cir. 2007). The water body was located above an aquifer that was susceptible of use by the plaintiff. *Id*. There was a possibility that the contaminants would migrate into the aquifer. *Id*. at 356. The Fifth Circuit held that the mere possibility of contamination constituted a threatened harm establishing a particularized, and not merely speculative, injury. *Id*. The plaintiff did not have to establish with certainty that the contamination would reach the aquifer, establish a time frame for the injury, or establish the strength of the contamination. *See id*.

Like the aquifer in *Consolidated Companies*, the Imhoff Aquifer is located below Lake Temp. (R. at 4). While the facts state that the water in the aquifer must be treated in order to be used, it does not state that New Union does not, in fact, treat and use the water. (R. at 4). It would therefore be inappropriate to presume that New Union does not use the water from the aquifer. At the very least, the aquifer is susceptible of use and thus is similar to the aquifer in *Consolidated Companies*. In the trial court, New Union presented evidence indicating that because the material between the lakebed and the aquifer is primarily unconsolidated alluvial fill, contaminated water from Lake Temp will reach the aquifer at some point. (R. at 5-6). The United States argues that because New Union may not drill, it is not capable of establishing a time frame for or potential strength of the contamination. (R. at 6). However, *Consolidated Companies* dictates that New Union does not need to prove time frame or strength in order to show a

particularized injury. Therefore, the trial court erred in holding that New Union needed to prove time frame and strength. (R. at 5-6). While the United States argues that New Union should be estopped from bringing this claim because it did not object to the Environmental Impact Statement (EIS), the EIS regulations do not provide that a state is estopped from bringing suit in a court of law when it has not exhausted its separate administrative remedies. 33 U.S.C.A. § 1344 (West 2011). The threat of aquifer contamination presents a heightened risk that the groundwater will become unusable or, at the very least, will require increased treatment efforts to be rendered usable. This threatened harm to New Union, analogous to the threatened harm in *Consolidated Companies*, is not too speculative to establish that New Union has suffered a particularized injury in fact.

ii. There is a Causal Connection Between the Injury and the Conduct Complained of because the COE's Issuance of the Permit Contributed to New Union's Injury.

New Union can establish a causal connection because it can show that its injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal citations omitted). New Union only needs to show that the actions of the COE contributed to its injuries. *See Mass.*, 549 U.S. at 499. A mere omission by a federal agency is sufficient to establish the causation element. *Id.* In *Mass. v. EPA*, the Court found a causal connection where the EPA's omission in failing to regulate greenhouse gas emissions contributed to the plaintiff's injuries. *Id.*

Here, the COE took an affirmative action, not a mere omission, when it issued a permit to the DOD to discharge contaminants into Lake Temp. (R. at 3). The DOD could not lawfully discharge the contaminants without this permit, and therefore, the COE's issuance of the permit significantly contributed to New Union's injury. New Union is challenging the COE's issuance of the permit, and New Union's injury is fairly traceable to this challenged action. Because the

DOD has not begun the discharge of the slurry, the COE is the only party who has acted. Consequently, New Union's injury is the result of the COE's action, not the action of a third party that is not before the court. Therefore, the causation element is satisfied.

iii. There is a Possibility that the Requested Relief will Prompt the Injury-Causing Party to Reconsider its Decision; in fact, the Requested Relief will Effectively Remedy the Injury.

New Union need not prove that the injury will likely be remedied by a favorable decision. *Lujan*, 504 U.S. at 561. New Union must merely prove that "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Mass.*, 559 U.S. at 517-18. Pursuant to § 404 of the CWA, if the Twelfth Circuit invalidates the COE permit, the DOD will be unable to discharge contaminants into Lake Temp. 33 U.S.C.A. § 1344 (West 2011). Thus, a favorable decision in this case will not only prompt the COE to reconsider its decision to issue the permit, but will also effectively remedy New Union's injury.

New Union has suffered a particularized, not speculative, injury in fact. The COE contributed to this injury by issuing a permit to the DOD, and the Twelfth Circuit's invalidation of that permit will effectively remedy New Union's injury. For these reasons, each of the three required elements is satisfied, and New Union has standing to bring this action in its sovereign capacity.

B. New Union has Standing to Bring this Action in its Parens Patriae Capacity as Protector of its Citizens Who have an Interest in the Groundwater.

States bring claims in their parens patriae capacity to ensure that they are not discriminatorily denied their rightful status within the federal system and to protect the interests of their citizens. The United States might attempt to argue that a state does not have standing in its parens patriae capacity to bring a claim against the federal government. *Snapp & Son, Inc. v.*

P.R., 458 U.S. 592, 610 n.16 (1982). However, this statement by the Supreme Court is not controlling law because it was mere dicta placed in a footnote and "was unrelated to the Court's ruling [in *Snapp*], which granted parens patriae authority to Puerto Rico to enforce a federal regulation against private citizens." *Conn. v. United States*, 369 F.Supp.2d 237, 245-46 (D. Conn. 2005); *Id*. at 245 n.8. In *Conn. v. United States*, the court stated: "[T]he Supreme Court did not hold, and has not held, that a state may never have parens patriae authority against the United States." *Id*. at 245-46.

A state always has standing in its parens patriae capacity to bring an action against the federal government "seeking federal agency enforcement of, or compliance with, federal laws or regulations." *Id*. New Union is bringing an action for compliance with federal law by the COE, a federal agency. (R. at 3). Therefore, New Union is not precluded from bringing an action against the United States in its parens patriae capacity.

To establish standing in its parens patriae capacity, New Union must prove the following elements: (1) It "must have alleged injury to a sufficiently substantial segment of its population"; and (2) It "must articulate a quasi-sovereign interest that is apart from the interests of particular private parties." *Conn. v. Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d 495, 504 (D. Conn. 2000), *citing to Snapp*, 458 U.S. at 607.

i. <u>New Union Alleges an Injury to a Sufficiently Substantial Segment of its Population.</u>

The Court has not established a particular number of citizens required to constitute a sufficiently substantial segment of a State's population. *Snapp*, 458 U.S. at 607. However, in analyzing this element, courts are required to consider indirect effects of the injury, not only direct effects. *Id*. There is an injury to a substantial segment of the population when there is a threat to the health and safety of the citizens due to a decrease in the quality of a State water

source. *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997). Economic repercussions, such as increased state taxes or the use of state tax revenues for an undesirable purpose, also constitute an injury to the citizens of a state. *Illinois v. Cheney*, 726 F. Supp. 219, 226 (C.D. Ill. 1989).

Part of the Imhoff Aquifer lies beneath New Union, and New Union has the power to issue permits for the removal of water from the aquifer. (R. at 4, 6-7). Therefore, the Imhoff Aquifer is a potential water source for the citizens of New Union. (R. at 4, 6-7). The contaminants from Lake Temp will reach the Imhoff Aquifer and decrease its water quality, which will affect the citizens of New Union. (R. at 5-6). This contamination presents a heightened risk that the groundwater will become unusable or, at the very least, will require increased treatment efforts to be rendered usable. If New Union engages in increased water treatment, state tax revenues will be used for this undesirable purpose. This will also create an enhanced risk of increased state taxes. Even if these effects are indirect, they are sufficient to satisfy this element. Because the contamination of the aquifer will affect the health, safety, and economic wellbeing of the citizens of New Union, New Union has alleged an injury to a sufficiently substantial segment of its population.

ii. New Union Articulates a Quasi-Sovereign Interest that is Apart from the Interests of Particular Private Parties.

To establish parens patriae standing, New Union must also "articulate an interest apart from the interests of particular private parties" by expressing "a quasi-sovereign interest." *Snapp*, 458 U.S. at 607. New Union can articulate a quasi-sovereign interest in two ways: (a) A quasi-sovereign interest "in the health and wellbeing, both physical and economic, of its residents in general"; and (b) A "quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *See id.*

1. *New Union has a Quasi-Sovereign Interest in the Health and Wellbeing, both Physical and Economic, of its Residents in General.*

States have "a quasi-sovereign interest in the health and well-being, both physical and economic, of [their] residents in general." *Snapp*, 458 U.S. at 607. According to the Court, this element will be satisfied if "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id*. In *Sierra Club*, the Fifth Circuit held that the State of Texas had a quasi-sovereign interest in protecting the wellbeing of its residents when there were threatened changes to the water quality and water level of a Texas aquifer. *Sierra Club*, 115 F.3d at 315. Here, because the material between the bed of Lake Temp and the Imhoff Aquifer is primarily unconsolidated alluvial fill, contaminated water from Lake Temp will reach the aquifer. (R. at 5-6). This will undoubtedly cause contamination of the water and a negative change in water quality. (R. at 5-6). New Union, like Texas, can thus establish that it has a quasi-sovereign interest in the health and wellbeing of its people.

2. *New Union has a Quasi-Sovereign Interest in not being Discriminatorily Denied its Rightful Status Within the Federal System.*

In *Hood v. City of Memphis*, an aquifer ran beneath Tennessee, Mississippi, and Arkansas. *Hood v. City of Memphis*, 570 F.3d 625, 627 (5th Cir. 2009). The Fifth Circuit held that because a percentage of the aquifer ran beneath Tennessee, Tennessee had a quasi-sovereign interest in having its rights adjudicated relative to the rights of other states. *Id*. at 633. Tennessee was thus an indispensable party in the litigation to determine what rights in the aquifer were due to each state. *Id*. at 631. The *Hood* case is directly analogous to the instant case. Part of the Imhoff Aquifer runs beneath New Union. (R. at 4). Consequently, New Union has a quasi-sovereign interest in having its rights in the aquifer adjudicated and ensuring that it is not being discriminatorily denied its rights within the federal system relative to other states.

New Union thus has interests in the health and wellbeing of its citizens and in not being discriminatorily treated, and has therefore established its quasi-sovereign interest. Because New Union alleges an injury to a sufficiently substantial segment of its population and articulates a quasi-sovereign interest apart from the interests of particular private parties, New Union has standing in its parens patriae capacity to bring this claim against the United States. Because New Union has both sovereign capacity standing and parens patriae standing, the district court erred in granting the United States' motion for summary judgment on this issue.

II. THE DISTRICT COURT ERRED IN GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF NAVIGABILITY BECAUSE LAKE TEMP IS NOT NAVIGABLE; THEREFORE, THE COE DID NOT HAVE JURISDICTION TO ISSUE A PERMIT PURSUANT TO § 404 OF THE CWA.

The CWA defines "navigable waters," for the purposes of the CWA, as "the waters of the United States, including the territorial seas." 33 U.S.C.A. § 1362(7) (West 2011). Lake Temp is not navigable under this definition for two reasons: (A) Lake Temp does not fit under the COE's expansive definition of navigability; and (B) Even if the court finds that Lake Temp does fit under the COE's definition, that definition is unconstitutional.

A. Lake Temp is not a Navigable Water Body Under the COE's Expansive Interpretation of Navigability.

For a water body to be a "water of the United States" and thus navigable for the purposes of the CWA, it must meet the threshold element of being "relatively permanent, standing, or continuously flowing." *Rapanos v. United States*, 547 U.S. 715, 734 (2006). Additionally, the COE contends that the water body must fit into one of three categories set forth in the COE's definition of "waters of the United States." *Id*. at 716, 734; 33 C.F.R. § 328.3(a).

Lake Temp is not a navigable water body for three reasons: (1) Lake Temp does not meet the *Rapanos* threshold element because while it may be a standing water body, it is not a

relatively permanent or continuously flowing water body; (2) Even if the court finds that Lake Temp does meet the *Rapanos* threshold element, that element is not controlling law; and (3) Even if the court finds that Lake Temp does meet the *Rapanos* threshold element, the lake does not fit into any of the COE's three categories as set forth in 33 C.F.R. § 328.3(a).

i. Lake Temp does not Meet the *Rapanos* Threshold Element.

Lake Temp does not meet the *Rapanos* threshold element because: (a) Lake Temp is not a relatively permanent water body, and (b) The "continuous flow" element does not apply to Lake Temp, nor does Lake Temp have a continuous flow of water.

1. *Lake Temp is not a Relatively Permanent Water Body.*

Intermittent bodies of water are not relatively permanent. *Rapanos*, 547 U.S. at 734. Also, lakes are not relatively permanent unless, "at bare minimum," they have the "ordinary presence of water." *Id*. Lakes that "dry up in extraordinary circumstances, such as drought," might, in some cases, still be considered relatively permanent. *Id*. at 732 n.5. Here, it is uncontested that Lake Temp is an intermittent body of water. (R. at 3). Further, Lake Temp does not have an ordinary presence of water. One out of every five years, the lakebed is completely dry. (R. at 4). This drying up does not occur under extraordinary circumstance such as droughts, but rather is part of the ordinary, cyclical condition of the lake. (R. at 4). Because Lake Temp is intermittent and does not have an ordinary presence of water, it is not a relatively permanent water body.

2. *The "Continuous Flow" Standard does not Apply to Lake Temp, and even if it does, Lake Temp does not have a Continuous Flow of Water.*

Case law indicates that the "continuous flow" standard only applies to streams and rivers, not to lakes. *Rapanos*, 547 U.S. at 732, 769. Therefore, the standard does not apply to Lake Temp. However, even if the court finds that this standard does apply, Lake Temp does not have a

continuous flow of water. A water body does not have a continuous flow of water if the flow is intermittent or merely provides drainage for rainfall. *Rapanos,* 547 U.S. at 739. Lake Temp is part of a watershed system and acts merely as a drainage basin for rainfall. (R. at 4). It does not have a continuous inflow of water because water does not flow into the lake continuously from the surrounding mountains but only intermittently when it rains. (R. at 4). This is evidenced by the fact that the lake's size varies dramatically depending on the amount of rain that falls. (R. at 4). In fact, there is absolutely no inflow during one out of every five years, and Lake Temp dries up completely. (R. at 4). In addition to the fact that the inflow is not continuous, there is no outflow from the lake whatsoever. (R. at 3-4). Thus, even if the court finds that the "continuous flow" standard applies in our case, Lake Temp does not have a continuous flow of water.

Lake Temp is not relatively permanent and does not have a continuous flow of water. Therefore, the *Rapanos* threshold element is not met, and Lake Temp is not a "water of the United States" and thus not a navigable water body for the purposes of the CWA.

ii. Even if the Court Finds that the *Rapanos* Threshold Element is Met, the Threshold Element is not Controlling Law, and Lake Temp is not Navigable Under the Controlling Law.

The *Rapanos* threshold element was only adopted by the *Rapanos* plurality. *See Rapanos*, 547 U.S. at 734. Justice Kennedy's concurring opinion, and not the plurality opinion, is the controlling rule of law from *Rapanos*. *United States v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007). Justice Kennedy "considered the plurality's [threshold element] to be inadequate." *Id*. He acknowledged that Congress's true purpose for the CWA was to protect downstream water quality. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in judgment). For Kennedy, the plurality's threshold element "…makes little practical sense in a statute concerned with downstream water quality." *Id*. Therefore, the controlling rule of law from *Rapanos* requires that

in determining whether a water body is navigable for purposes of the CWA, the court must examine the effect that the water body has on downstream water quality, rather than examining the threshold element. *See id*.

The facts specifically state that Lake Temp has no outflow and do not suggest that Lake Temp is connected to any downstream water body. (R. at 4). Lake Temp thus does not have any effect on downstream water quality. Therefore, the controlling law from *Rapanos* necessitates a finding that Lake Temp is not navigable for the purposes of the CWA.

iii. Even if the Court Finds that the *Rapanos* Threshold Element is not met, Lake Temp does not fit into any of the COE's Three Categories set forth in its Expansive Interpretation of "Waters of the United States."

According to the Court, the COE's three-category interpretation of "the waters of the United States" is very "expansive." *Rapanos*, 547 U.S. at 716. The COE's three categories include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce … . 33 C.F.R. § 328.3(a).[1]

[1] The COE's interpretation of "the waters of the United States," as found in 33 C.F.R. § 328.3, also includes certain tributaries, wetlands adjacent to navigable water bodies, and the territorial seas. None of those types of water bodies is relevant in this case.

1. *Lake Temp does not fit under 33 C.F.R. § 328.3(a)(1) because it is not Currently used for, has not been used in the past for, and is not Susceptible to use in Interstate or Foreign Commerce.*

Nonresident travelers who engage in activities in foreign states that do not involve purchasing products or services are not participating in an inherently economic activity that is considered commerce. *Minn. v. Hoeven*, 370 F. Supp. 2d 960, 969 (N.D. Dist. 2005). "Purely recreational, sporting activity," such as hunting, is not commercial activity; nonresident hunters are only involved in recreation, not commerce. *Id*. The nonresident hunters who enter Progress use Lake Temp solely for duck hunting, a purely recreational activity, and not for purchasing products or services. (R. at 4). Because these hunters are merely involved in recreation, not commerce, Lake Temp is not currently being used for interstate or foreign commerce. Further, there are no facts to suggest that Lake Temp has ever been used for interstate or foreign commerce in the past. Additionally, because hunting is not commerce, there are no facts to suggest that Lake Temp is susceptible to any other kind of interstate or foreign commerce. For these reasons, Lake Temp is not currently used for, has not been used in the past for, and is not susceptible to use in interstate or foreign commerce. Therefore, Lake Temp does not fit under 33 C.F.R. § 328.3(a)(1).

2. *Lake Temp does not fit under 33 C.F.R. § 328.3(a)(2) because it is not an Interstate Water Body.*

Lake Temp is not an interstate water body because it is wholly located within the State of Progress and does not have any outlets. (R. at 4). Lake Temp is thus entirely intrastate and does not fit under 33 C.F.R. § 328.3(a)(2).

3. *Lake Temp does not fit under 33 C.F.R. § 328.3(a)(3).*

Lake Temp does not affect interstate commerce, and thus does not fit under 33 C.F.R. § 328.3(a)(3), because: (1) Recreational hunting by nonresident hunters does not affect interstate

commerce; and (2) Even if the court finds that nonresident hunting could affect interstate commerce, it can only do so through a violation of state and federal law and thus is not a legitimate means of affecting interstate commerce.[2]

iv. Lake Temp does not fit under 33 C.F.R. § 328.3(a)(3) because Recreational Hunting by Nonresident Hunters does not affect Interstate Commerce.

If the only "purpose for the nonresident hunters' interstate movement is the pursuit of a purely recreating activity – hunting" – those nonresidents are not affecting interstate commerce. *Hoeven*, 370 F. Supp. 2d at 969. "[N]onresident hunters are not 'persons in commerce' and thus do not fall within the purview of the Commerce Clause." *Id*. Therefore, the nonresident hunters' hunting on Lake Temp does not affect interstate commerce.

v. Lake Temp does not fit under 33 C.F.R. § 328.3(a)(3) because, even if the Court Finds that Hunting could affect Interstate Commerce, it can only do so through a Violation of State and Federal Law and thus is not a Legitimate Means of Affecting Interstate Commerce.

According to the Lacey Act, it is illegal to "import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce … any wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State … ." 16 U.S.C.S. § 3372(a)(2) (LexisNexis 2011). It is illegal to enter onto the DOD property where Lake Temp is located, which the DOD clearly indicated by posting signs every 100 yards, strictly forbidding all access to the lake. (R. at 4). Thus, hunters who enter onto the DOD property in blatant violation of the DOD's posted signs are illegally trespassing on the land and taking the ducks in violation of New Union trespass law. The Lacey Act dictates that it is illegal for these nonresident hunters to put the ducks into interstate commerce by transporting the ducks back to their home states. *See* 16 U.S.C.S. § 3372(a)(2) (LexisNexis 2011). This analysis shows that if nonresident hunting on

[2] Only (a)(3)(i) is applicable to this fact pattern. This brief does not address (a)(3)(ii) or (a)(3)(iii) because the facts do not involve fish, shellfish, or industrial uses of Lake Temp.

Lake Temp affects interstate commerce in any way, it can only do so through a violation of federal law and thus is not a legitimate means of affecting interstate commerce. As a policy matter, a lake's status as a navigable water body under the CWA should not be dictated by illegal activity of a few nonresident hunters. Therefore, Lake Temp does not fit under 33 C.F.R. § 328.3(a)(3).

Lake Temp does not meet the *Rapanos* threshold element and thus is not navigable for the purposes of the CWA. Even if the court finds that Lake Temp does meet the threshold element, that element is not controlling law. The controlling law, found in Justice Kennedy's concurring opinion, states that navigable water bodies must affect downstream water quality. Because Lake Temp does not affect downstream water quality, it is not navigable for the purposes of the CWA. Even if the court rejects this argument and finds that the *Rapanos* threshold element is met, Lake Temp does not fit into any of the COE's three categories as set forth in 33 C.F.R. § 328.3(a). Therefore, Lake Temp is not a "water of the United States" under the COE's expansive interpretation of navigability and is not a navigable water body for the purposes of the CWA. The CWA thus does not apply to Lake Temp, and neither the COE nor the EPA had jurisdiction to issue a permit pursuant to the CWA. The district court therefore erred in holding that the COE had jurisdiction to issue a § 404 permit and in granting the United States' motion for summary judgment on this issue.

B. Even if the Court Finds that Lake Temp is Navigable Under the COE's Expansive Definition of Navigability, this Expansive Definition is Unconstitutional.

The Court has held that any "expansive interpretation" of the CWA by the government "would result in a significant impingement on the States' traditional and primary power of land and water use." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). If federal jurisdiction were interpreted too expansively under the CWA, the

government would be authorized to regulate "immense stretches of intrastate land" and thereby encroach on the authority of a State's police power to regulate land use and recreation. *Rapanos*, 547 U.S. at 737-38. The federal government may only usurp a State's police power when there is a "clear and manifest statement from Congress to authorize" the intrusion. *Id*. The Court has explicitly held that the CWA language, "the waters of the United States," "hardly qualifies" as a clear and manifest authorizing statement from Congress. *Id*. The Court recognizes that the COE, in creating its own regulations, "consciously sought to extend its authority to the farthest reaches of the commerce power" of the Constitution. *Id*. at 738. However, the Court has held that the COE's expansive interpretation of the term "the waters of the United States" is unconstitutional because it exceeds the authority of the commerce power and interferes with State police power. *Id*. Because the COE's expansive interpretation is unconstitutional and infers with Progress's police power, this court must disregard the COE's definition when determining whether Lake Temp is navigable for the purposes of the CWA.

Lake Temp does not fit under the COE's expansive definition of navigability. Even if the court finds that it does, that definition is unconstitutional. Therefore, Lake Temp is not navigable for the purposes of the CWA and is not subject to the CWA's provisions. Consequently, neither the COE nor the EPA had jurisdiction to issue a permit pursuant to the CWA. The district court thus erred in granting the United States' motion for summary judgment on the issue of navigability and in ruling that the COE had jurisdiction to issue a permit pursuant to § 404 of the CWA.

III. ALTERNATIVELY, THE DISTRICT COURT CORRECTLY GRANTED THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON THE JURISDICTION ISSUE BECAUSE THE COE HAS JURISDICTION TO ISSUE § 404 PERMITS FOR DISCHARGES OF FILL MATERIAL.

If the court finds that Lake Temp is navigable and is subject to the provisions of the CWA, the court must also find that the COE has jurisdiction to issue a § 404 permit and that the EPA does not have jurisdiction to issue a § 402 permit. According to § 402 of the CWA, the EPA has jurisdiction to issue permits for the discharge of any pollutant that is not fill material. *Coeur Alaska., Inc. v. S.E. Alaska Conservation Council*, 129 S.Ct. 2458, 2467-69 (2009). If the substance to be discharged is fill material, the COE has exclusive jurisdiction to issue permits pursuant to § 404, regardless of whether the fill material is also a pollutant or a hazardous substance. *Id*. A slurry is fill material if, when discharged into a body of water, it changes the elevation of that body of water. *Id*. at 2464. The discharge of slurry into Lake Temp will raise the lakebed by several feet and will raise the water elevation by six feet. (R. at 4). This means that the slurry is fill material and is subject to the exclusive jurisdiction of the COE, pursuant to § 404. Because the slurry is fill material, the fact that it is a pollutant and may contain some hazardous substances is of no consequence.

New Union might argue that there is a conflict of interest here because the COE, a subordinate of the DOD, is issuing a permit to the DOD. (R. at 8). However, the trial court was correct in holding that the CWA does not contain any provisions stating that the issuance of a permit under these circumstances is a violation of the statute. (R. at 8-9). Because the slurry in question is fill material, and because New Union's argument about conflicts of interest does not hold water, the trial court properly held that the COE had jurisdiction to issue a § 404 permit.

IV. THE DISTRICT COURT CORRECTLY GRANTED THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE PARTICIPATION OF THE OMB AND THE EPA.

Neither the OMB nor the EPA violated the CWA in this case because: (A) The OMB's resolution of the dispute between the COE and the EPA did not violate the CWA; and (B) The EPA did not violate the CWA by acquiescing to the OMB's directive.

A. The OMB's Participation in Deciding the Dispute Between the COE and the EPA did not Violate the CWA.

The OMB, which sits within the President's Office of the White House, has authority over the EPA and the COE pursuant to the United States Constitution. U.S. CONST. art. II, § 1, ¶ 1. According to Article II of the Constitution, all of the executive power of the United States is vested in the President. *Id*. Pursuant to this constitutional authority, which creates a "unitary executive" system, the President has the authority to control all administrative activity within the executive branch. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2247 (2001). Thus, the OMB, through the President's office, has authority to regulate the activities of the EPA and the COE. *See id*. Additionally, the OMB is given specific authority to resolve disputes between the COE and the EPA in an Executive Order from the President. Exec. Order No. 12,088, 43 Fed. Reg. 47, 707 (Oct. 13, 1978). The fact that the CWA does not mention the authority of the OMB does not render null the OMB's general authority under the United States Constitution and the President's Executive Order, which apply above and beyond the CWA. *See generally* Kagan, *supra*. Therefore, in deciding the dispute between the COE and the EPA, the OMB acted within its authority and did not violate the CWA.

B. The EPA did not Violate the CWA by Acquiescing to the OMB's Directive.

The EPA did not violate the CWA in this case because: (1) The EPA's decision not to prohibit the COE's issuance of a § 404 permit is not subject to judicial review; and (2) Even if the EPA's decision is reviewable, its decision was not arbitrary or capricious.

i. The EPA's Decision not to Prohibit the COE's Issuance of the § 404 Permit is not Subject to Judicial Review.

While New Union seeks judicial review of the EPA's decision pursuant to the Administrative Procedure Act (APA), the APA expressly states that the decision of an executive agency is not reviewable when that "agency action is committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2) (West 2011). Congress has given the Administrator of the EPA purely discretionary authority to veto permits issued by the COE pursuant to § 404(c) of the CWA. 33 U.S.C.A. § 1344 (West 2011). Section 404(c) provides that "[t]he Administrator is *authorized*" to veto a COE permit when the EPA determines that the discharge in question "will have an *unacceptable* adverse effect on municipal water supplies … ." *Id.* (emphasis added). The use of the word "authorized" in § 404(c), as well as the absence of any mandatory language, such as the word "shall," shows that Congress intended for the Administrator of the EPA to have complete discretion in these cases. Thus, in this case, the Administrator of the EPA had absolute discretion to determine whether the discharge of slurry into Lake Temp was acceptable, and then to decide whether or not to veto the COE permit. The EPA's decision in this case, made pursuant to agency discretion, is thus not reviewable under the APA. Additionally, the EPA has taken no final action in this case. (R. at 9). If the EPA had vetoed the permit issued by the COE, that decision might, arguably, constitute a final action that might be reviewable. Here, however, the EPA chose not to act and thus did not take a final action. (R. at 9). For these reasons, the EPA's decision not to prohibit the COE's issuance of the § 404 permit is not subject to judicial review.

ii. Even if the Court Finds that the EPA's Decision is Reviewable, its Decision did not Violate the CWA because it was not Arbitrary or Capricious.

The EPA's decision, if reviewable, is entitled to *Chevron* deference. *Chevron U.S.A. v. Nat'l Resources Def. Council*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, courts must respect "the unambiguously expressed intent of Congress" and determine that an executive agency's action was not arbitrary or capricious if that action comported with Congressional intent. *Id*. As discussed above, Congress has expressly and unambiguously given the EPA complete discretion to determine whether a COE-issued permit is acceptable and whether to veto it. 33 U.S.C.A. § 1344 (West 2011). Because Congressional intent is clear and unambiguous in this case, and because the EPA comported with that Congressional intent in using its discretion, "that is the end of the matter" under the *Chevron* deference test. *Chevron*, 467 U.S. at 842-43. Therefore, the EPA's decision in this case was not arbitrary or capricious. *See id.*

However, even if the court finds that Congress's intent was ambiguous, the court is not permitted to find that the EPA violated the CWA if the EPA's decision in this case was "based on a permissible construction of the [CWA]." *See id*. In deciding whether the EPA's decision was based on a permissible construction of the CWA, the court is strictly limited to a determination of whether the agency's decision was arbitrary or capricious. 5 U.S.C.A. § 706(2)(A) (West 2011). The EPA's decision in this case was not arbitrary or capricious because: (a) The EPA did not merely acquiesce to the OMB's directive without examining the merits of the case, and the EPA's decision comported with its authority under § 404 of the CWA; and (b) The EPA's decision in this case was either required by, or at least consistent with, the United States Supreme Court's decision in *Coeur Alaska*.

1. *The EPA did not Merely Acquiesce to the OMB's Directive Without Examining the Merits of the case, and the EPA's Decision Comported with its Authority Under § 404 of the CWA.*

The EPA's authority under § 404 is wholly discretionary. 33 U.S.C.A. § 1344 (West 2011). Therefore, the EPA is not required either to determine that a discharge under a COE permit is unacceptable, or to decide to veto that permit. In fact, the EPA has only prohibited the issuance of a § 404 permit by the COE in twelve instances over thirty-six years, during which time the COE has reviewed more than one million § 404 permit applications. *Coeur Alaska*, 129 S. Ct. at 2483 n.5. In its history, the EPA has only once vetoed a permit after it was already issued by the COE. *See* ENVIRONMENTAL PROTECTION AGENCY, *Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia* (Jan. 12, 2011), http:// water.epa.gov/ lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-_1_Mine_Final_Determination_ 011311_signed.pdf. In that case, the EPA stated that it only vetoed the COE permit post-issuance because, after the permit was issued, the EPA received new and alarming scientific information about the effects that the project would have on wildlife in the area. *Id*. at 45-73.

In this case, however, no new or alarming scientific facts have come to light that would compel the EPA to veto this permit after it has already been issued. The fact that the EPA has only ever prohibited twelve permits pre-issuance, and only ever vetoed one permit post-issuance, shows that the EPA only has an interest in prohibiting § 404 permits in extreme cases. The EPA was thus well within its § 404 discretion to determine that the circumstances of this case were not extreme enough to warrant an EPA veto. Therefore, the EPA reached its own determination on the merits of the case and did not merely acquiesce in the OMB's directive. For these reasons, the EPA's decision in this case was not arbitrary or capricious.

2. *The EPA's Decision in this case was Required by, or was at least Consistent with, the United States Supreme Court's Decision in Coeur Alaska.*

In *Coeur Alaska*, the COE sought to issue a § 404 permit for the discharge of fill material. *Coeur Alaska*, 129 S. Ct. at 2463-64. The EPA found that this discharge would not be "environmentally preferable." *Id*. at 2465. However, the EPA chose not to prohibit the issuance of the permit because the discharge would not create an "unacceptable" effect on the environment under the § 404(c) guidelines. *Id*. In its decision, the EPA "in effect deferred to the judgment of the [COE]." *Id*. The Court held that when the COE has authority to issue a § 404 permit, it is not arbitrary or capricious for the EPA to not take action. *Id*. at 2460. It is therefore acceptable for the EPA to determine that it does not have the authority to regulate the COE permit, or to defer to the decision of the COE when the permit will not create an "unacceptable" effect on the environment. *Id*. The *Coeur Alaska* Court thus held that the EPA acted within its discretion when it deferred to the judgment of the COE. *Id*.

Here, the EPA's decision not to veto the COE permit shows that the EPA must have determined that the discharge of slurry into Lake Temp would not create unacceptable effects. (R. at 10). Thus, the EPA's decision to defer to the COE in this case was required by, or was at least consistent with, the Court's decision in *Coeur Alaska*. Therefore, the EPA's decision in this case was not arbitrary or capricious.

In this case, the EPA did not merely acquiesce to the OMB's directive without examining the merits of the case. Additionally, the EPA's decision comported with its authority under § 404 of the CWA and was required by, or was at least consistent with, the *Coeur Alaska* decision. Therefore, the EPA's decision in this case was not arbitrary or capricious and did not violate the CWA. Consequently, the court cannot find that the EPA violated the CWA even upon a finding that the EPA's decision is judicially reviewable. Because the EPA did not violate the CWA by

acquiescing to the OMB's directive, and because the OMB's participation in deciding the dispute between the COE and the EPA did not violate the CWA, the district court correctly granted the United States' motion for summary judgment on this issue.

CONCLUSION AND PRAYER FOR RELIEF

The district court erred in granting the United States' motions for summary judgment on the following issues: (1) that New Union did not have standing, and (2) that Lake Temp was navigable. The district court correctly granted the United States' motions for summary judgment on the following issues: (3) that the COE had jurisdiction to issue a § 404 permit, and (4) that the OMB's resolution of the dispute between the COE and the EPA did not violate the CWA. The State of Progress therefore respectfully respects that this court reverse the district court's decisions regarding standing and navigability, and that this court affirm the district court's decisions regarding the COE's jurisdiction and the proper conduct of both the OMB and EPA.